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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFFORD EDWARD WONG,

Defendant and Appellant.

H024128

(Santa Clara County

Super. Ct. No. CC199384)

Defendant Clifford Edward Wong appeals a judgment following a jury trial during which he was convicted of attempting to dissuade a witness from reporting a crime, a felony (count 2 - Pen. Code, § 136.1, subd. (b)(1)),¹ and misdemeanor battery (§§ 242, 243, subd. (a)). The jury found defendant not guilty of a charge of inflicting corporal injury on his spouse. (Count 1 - § 273.5, subd. (a).) In bifurcated proceedings, the trial court found that defendant has a 1997 serious felony conviction of assault with intent to rape for which he served a prior prison term.

The trial court denied defendant's motions to strike his prior strike and to reduce the felony charge to a misdemeanor, and sentenced defendant to prison for a total of five

¹ Unspecified section references are to the Penal Code.

years, consisting of the midterm of two years, doubled due to his prior strike (§ 667, subd. (e)(1); § 1170.12, subd. (c)(1)), and enhanced by one year due to his prison prior (§ 667.5, subd. (b)).

Defendant asserts the following errors on appeal: the trial court limited cross-examination of the victim regarding whether she had applied for immigration benefits as a result of the charges against defendant; the trial court allowed the prosecutor to elicit evidence of battered women's syndrome from an unqualified witness; the prosecutor's closing argument was improper in several ways; defense counsel was ineffective in failing to object to the prosecutor's misconduct and to offer evidence that the victim has a propensity for making false accusations.

Defendant also filed a petition for habeas corpus based on claims of ineffective assistance, which we dispose of by separate order.

We find that defendant was not prejudiced individually or collectively by any arguable error, and affirm the judgment.

STATEMENT OF FACTS

The charged offenses occurred on January 9, 2001, and were described at trial by defendant's wife, Sonia Wong, and her relatives. Defendant did not testify at trial.

I. Prosecution Evidence

Sonia² and defendant met in November 1999, when she was 16 years old and he was 24. Two months later they began dating. Two or three months later they moved into an apartment that they shared with Vanessa, Sonia's daughter by her previous boyfriend. After a month or two they began arguing about various things. Defendant was jealous of Sonia talking with her previous boyfriend. During arguments defendant sometimes

² We use first names to avoid confusion over common last names and not out of disrespect.

pulled her hair, held her wrists, pushed her with his chest, and threw her onto the bed. Defendant would stop pushing her when she told him to, but later would do it again. They separated after four or five months because they argued so much.

Sonia and defendant got back together and dated for about two and one-half months before getting married on November 11, 2000 in Reno. He moved in with Sonia into a residence on Bismarck Drive in San Jose, shared by Sonia's older brother and his wife, as well as Sonia's mother and her younger brother.

On January 9, 2001, at around 10:00 p.m., Sonia went outside to tell defendant to come in for dinner so they could lock the doors and go to sleep. Sonia found defendant sitting in his car parked on the street talking on the telephone. She questioned to whom he was talking. He said, "With no one, bitch." She reached in the window to grab the phone from him. He grabbed her wrist and her hair, pulling her into the car. She punched his face, drawing blood. He let her go. He exclaimed that she had hit him.

As Sonia walked back to their residence, defendant got out of his car, came up behind her, and kicked her in the back, knocking her to her knees on the ground. As Sonia covered her face, defendant repeatedly struck Sonia either with an open hand or with a fist.

Defendant stopped hitting Sonia after her brother yelled at him to stop. Sonia got up and walked onto the patio of the house. Defendant followed her. Defendant kept saying he was sorry. He tried to hug her, but he was also pushing her with his chest. Sonia challenged him to hit her, but he did not.

Sonia called 911 this time "[b]ecause he never hit me in my back with his feet and he never threw me like a dog on the floor." On the phone Sonia began describing that her boyfriend, to whom she was married, was hitting her. Defendant tried to take the telephone away from her. Failing to do so, he unplugged the phone. He gathered some belongings from the house and left. A 911 operator called back. Sonia said on the phone that defendant was leaving. Sonia told defendant not to leave because the police were

coming and it would look bad. She tried to chase him holding the telephone, and fell over a fence and dropped the phone.

The police arrived. When an officer asked if Sonia was injured by defendant, she said she was and said, “Look at me.” She told him that some bruises were from prior incidents of violence. The officer took photographs of Sonia’s cuts and bruises.

At trial Sonia explained that defendant did not cause all the bruises she displayed that night, and that she bruises easily. Some bruises on her left arm resulted from the removal of a birth control implant. The biggest bruise on her right arm resulted from a shot. A bruise on her right wrist was from burning herself on an iron. That night her right eye and her left leg were bruised, but this may have happened when she fell over the fence while chasing defendant.

At trial Sonia said she still loved defendant. “He’s a nice guy. All he has is a bad temper.” They exchanged letters while defendant was in jail, but she did not visit him.

II. Defense Evidence

A deputy public defender, Griselda Begines, testified as an expert in immigration law as follows: The federal Violence Against Women Act (VAWA) was passed in 1994, and is widely publicized in immigrant communities. Fliers explain “How to get permanent residence if your spouse abuses you.” If you are abused, “you . . . may be able to receive . . . permission to work and live in the United States and a green card without your spouse’s help, free medical care and governmental benefits such as money and food stamps.”

The VAWA provides shortcuts through the regular immigration requirements for immigrants who marry a United States citizen. Normally, an alien who marries a United States Citizen must have entered the country legally, have a two-year residency, and the application for citizenship must be supported by his or her spouse. However, the VAWA allows a faster application process to those spouses who can show abuse. To obtain VAWA benefits a person must prove (a) by marriage certificate or otherwise that he or

she are married, (b) by birth certificate or otherwise that his or her spouse is a citizen, (c) by police report or otherwise that his or her spouse has abused the person, and (d) by statement under oath that the marriage was in good faith, and (e) that the couple have lived together. A VAWA application is privileged, and an applicant's attorney will often recommend that he or she invoke the Fifth Amendment if anyone besides the immigration service seeks the information.

Sonia testified that she had seen and understood fliers explaining the VAWA. Defendant is a United States citizen. He called to obtain his birth certificate so that they could get married. A few days after the incident she called defendant's father to obtain a copy of their marriage certificate. She had previously testified that she got a copy of the police report, but she was mistaken. What she received from the police was an emergency protective order and a flier giving information about and contacts for domestic violence.

A public defender investigator, Margarite Andrade, testified that in 1999, Sonia admitted to her that she had a fake green card with a false date of birth and social security number so that she could work at McDonald's.

Crystal Vest, who was once married to Sonia's brother, also testified. By the time of trial, Ms. Vest was a youth outreach worker who helped former gang members get their tattoos removed. During one of her regular jail visits, she saw defendant. Ms. Vest called Sonia to find out why defendant was in jail. Sonia told Ms. Vest she had blamed defendant for bruises he had not caused, and that the couple argued after Sonia grabbed the telephone away from defendant because he was talking to another female. Defendant had basically just defended himself against Sonia, but Sonia exaggerated the situation to the police.

DISCUSSION

Defendant asserts the following errors on appeal: the trial court limited cross-examination of the victim regarding whether she had applied for immigration benefits as

a result of the charges against defendant; the trial court allowed the prosecutor to elicit evidence of battered women's syndrome from an unqualified witness; the prosecutor's closing argument was improper in several ways; defense counsel was ineffective in failing to object to the prosecutor's misconduct and to offer evidence that the victim has a propensity for making false accusations.

I. Limitation of Cross-examination of Sonia

Defendant asserts on appeal that the trial court erred by limiting his cross-examination of Sonia, and allowing her, in the jury's absence, to invoke her privilege against self-incrimination regarding whether she made a Violence Against Women Act (VAWA) application.

Background

At the outset of trial, defendant announced his intent to establish that Sonia was motivated to establish that she was a victim of domestic violence so that she could receive immigration benefits under the VAWA. The prosecutor objected under Evidence code section 352 that the examination would be time-consuming and the defense had no evidence that Sonia was aware of the VAWA before the January 9, 2001 incident. The court determined that an Evidence Code section 402 hearing would be appropriate to find out what Sonia knew. The court further determined that such a hearing was appropriate to determine whether there were prior instances of domestic violence admissible under Evidence Code section 1109.

At the Evidence Code section 402 hearing, Sonia was called to testify, and had her own attorney, Al Morales, with her at the hearing. She admitted that she had obtained a copy of the police report of the incident. The following testimony occurred on cross-examination.

“Q. Did you submit a copy of that police report to the INS?

“A. What do you mean?

“MR. MORALES: Objection, your Honor. I’m going to ask her to invoke privilege [*sic*] on anything having to do with immigration or INS.

“THE COURT: Do you assert your Fifth Amendment right, ma’am?

“THE WITNESS: Yes, I do.

“MR. HOOPES: I don’t think it’s a crime to submit reports to the INS the last I heard. I don’t think she has a Fifth Amendment privilege in this case and I would ask that she answer the question.

“MR. MORALES: It’s my position that anything that leads to information concerning your status in this country threatens her interest in terms of criminal charges.

“THE COURT: Any response to that, sir? Anything else on the topic?

“MR. HOOPES: I would submit it.

“THE COURT: I think she may well have a Fifth Amendment privilege there and she’s asserted it.”

Sonia also successfully invoked the Fifth Amendment as advised by her counsel in response to the following questions. “And did you have a visit with your attorney about a week after you talked with -- after you married Mr. Wong?” “Did you ever obtain a false resident alien card?” “Did you ever use a false resident alien card to work at McDonald’s?” “Did you ever sign under penalty of perjury to a social security number that was not yours?” “Did you ever sign to a birth date that was a false birth date that was not yours under penalty of perjury?”

Following the Evidence Code section 402 hearing, the court ruled that defendant would be permitted to present VAWA evidence, but not to ask questions in front of the jury requiring Sonia to invoke the Fifth Amendment.

At trial, defendant did not question Sonia about making a VAWA application. However, he did establish through cross-examination that she was familiar with the VAWA before the incident, that defendant had obtained a copy of his birth certificate

before their marriage, and that she had obtained a copy of their marriage certificate after the incident.

Analysis

It is undisputed that Sonia, whatever her immigration status, has a Fifth Amendment privilege against being compelled to incriminate herself. (Cf. *United States v. Balsys* (1998) 524 U.S. 666, 671.) And defendant, like every criminal defendant, has a Sixth Amendment right to confront and cross-examine the witnesses against him. (*Douglas v. Alabama* (1965) 380 U.S. 415, 418; *Davis v. Alaska* (1974) 415 U.S. 308, 316 (*Davis*).) Here, the trial court was required to balance defendant's rights to confrontation and the witness' right against self-incrimination.

Although the right to cross-examination is contained in the Sixth Amendment, it is not limitless. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. (*Van Arsdall* (1986) 475 U.S. 673, 678-679.) Unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" (*id.* at p. 680), the trial court's exercise of its discretion in limiting cross-examination does not violate the Sixth Amendment.

Here, the court limited defendant from asking Sonia questions about her immigration status, and whether she had filed an application under VAWA. We perceive a real danger that Sonia might have incriminated herself by answering a question about her immigration status, particularly if she entered the country illegally. To this extent, the trial court was justified in allowing Sonia to invoke the privilege, and to limit defendant's cross-examination accordingly.

However, with regard to whether Sonia filed a VAWA application, we find nothing inherently incriminating, because the fact of filing the application suggests that

she is not a United States citizen, but not that she is an illegal alien. As such, Sonia had no need to invoke her Fifth Amendment privilege.

Moreover, evidence of whether Sonia had filed a VAWA application was relevant to defendant's assertion that Sonia manufactured claims of spousal abuse, because a VAWA application provides a shortcut to adjusting an alien's immigration status. Under the federal immigration law, an alien spouse of a United States citizen can apply for status as a lawful permanent resident by petitioning to the United States Attorney General jointly with his or her spouse. (8 U.S.C. §§ 1151, subd. (b)(2)(A)(i), 1154, subd. (a), 1186a, subd. (c)(1).) However, a joint petition is unnecessary under the VAWA if "during the marriage the alien or a child of the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's spouse." (8 U.S.C. §§ 1154, subd. (a)(1)(A)(iii)(I), 1186a, subd. (c)(4)(C).) Battery and extreme cruelty are among the circumstances that authorize the Attorney General to cancel the removal of a deportable alien. (8 U.S.C. § 1229b, subd. (b)(2)(A)(i)(I).)

If the trial court had not allowed Sonia to invoke her Fifth Amendment privilege, and instead required Sonia to answer whether she had submitted a VAWA application, this could have bolstered the defense theory that immigration benefits motivated her to falsely accuse defendant, her husband, of assault. However, in light of the fact that defendant was permitted to introduce other evidence to impeach Sonia, we conclude that this topic of cross-examination would not reasonably have produced a different impression of Sonia's credibility. Specifically, defendant produced evidence that Sonia had obtained a false green card, and that she told Crystal Vest that she had exaggerated the situation to the police. Defendant also introduced evidence that Sonia misled the police the night of the incident by exhibiting bruises that defendant had not caused. Moreover, we note that the jury evaluated Sonia's testimony, and acquitted defendant of the greater charged felony offense of inflicting corporal injury on his spouse, convicting him instead of the lesser offense of misdemeanor battery.

Assuming that the trial court erred in not allowing defendant to ask whether Sonia had submitted a VAWA application, we conclude that this topic of cross-examination would not reasonably have produced a different impression of Sonia's credibility. As such, defendant was not prejudiced by the trial court's restriction on defendant's cross-examination of Sonia. (*People v. Frye* (1998) 18 Cal.4th 894, 946-947.)

II. Evidence of Battered Women's Syndrome

On appeal, defendant contends that the trial court erred by allowing the prosecutor to introduce evidence of battered women's syndrome through a witness without expertise on the subject.

Background

During trial, defendant called Crystal Vest to testify that Sonia had told her that defendant had basically defended himself and that Sonia had exaggerated the incident to the police. At the time of trial, Ms. Vest was a youth outreach counselor who specialized in helping ex-gang members get their tattoos removed, and regularly went to the Elmwood jail.

On cross-examination, Ms. Vest testified that she worked with women, some of whom had been victims of domestic violence, at Elmwood jail. Ms. Vest further testified that it was fairly common for victims of domestic violence to minimize what happened and to blame themselves for the abuse. The court overruled defendant's objections that Ms. Vest's testimony was irrelevant because she was not a domestic violence expert.

Analysis

The trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse. “ “Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility.”’ [Citation.]” *People v. Bolin* (1998) 18 Cal.4th 297, 321-322: “Evidence Code section 720 provides that a person may testify

as an expert “if he has special knowledge, skill, experience, training, or education sufficient to qualify him . . . ” (*id.*, subd. (a)), which “may be shown by any otherwise admissible evidence, including his own testimony.” (*Id.*, subd. (b).)

We find no abuse of discretion in allowing Ms. Vest to answer these questions on cross-examination. Ms. Vest testified that she had experience talking with female victims of domestic violence. This qualified her to offer an observation about whether it was typical of such victims to blame themselves and minimize what had happened to them. (*People v. Farnam* (2002) 28 Cal.4th 107, 153-154.) In view of this conclusion we do not consider whether defendant was prejudiced by this testimony or whether it combined with the error in the court’s Fifth Amendment ruling.

III. *Prosecution Argument*

On appeal, defendant asserts that he was prejudiced by several instances of misconduct during the prosecution’s closing argument to the jury. Specifically, the prosecutor impermissibly referred to defense counsel’s ethics, and to evidence contained in letters that was not before the jury.

Background-Ethics of Defense Counsel

The prosecutor began his closing argument as follows. “Ladies and gentlemen, one of the advantages of being a prosecutor is that you are the ones that decide what happens in these cases. We put the witnesses on and ask you to decide what happened. We are not bound to try to convince you of something that didn’t happen. We bring the cases to trial where there is evidence, and it’s already gone through a judge, through a preliminary examination where the judge found there is probable cause to send it to a jury.

“This defense, as in every case, comes up here and spins a [tale]. He is not under the same ethical obligations that I am.”

Defense counsel stated, “I object.” The court stated: “We are not talking about ethics. It works both way[s].” The prosecutor continued: “[Defense counsel] came up and spun a [tale] for you. The reason that man is sitting here is due to his own actions.”

At the conclusion of closing argument, the court admonished the jury: “It is improper for counsel to suggest what the tactics or ethical obligations or motives of other counsel are. It’s gone both ways here in the political remarks. I am striking those remarks from the record. You are instructed to disregard them and not consider them part of deliberations.”

At the conclusion of the defense argument, the court stated: “I will remind you folks that the personal remarks of counsel are not evidence, and in interpreting the arguments of what the evidence shows, it’s your call, your decision of what the evidence shows.”

Analysis

Defendant contends that the court’s admonition to the jury came too late and was not specific enough about what remarks were stricken. However, the court’s second admonition referred to and clarified the court’s earlier statement that the prosecutor should not have been talking about defense counsel’s ethics. Moreover, the court was warranted in indicating that both sides had made improper remarks. We conclude that the admonition ameliorated any potential prejudice from these comments by the prosecutor, and presume that the jury heeded the admonition. (*People v. Wash* (1993) 6 Cal.4th 215, 263.)

Defendant further contends that the prosecutor’s remarks suggested that defendant was guilty based on evidence not produced at trial. However, the court instructed the jury prior to argument in part as follows. “You must not be influenced by pity for or prejudice against a defendant because he has been arrested for this offense, charged with a crime or brought to trial. None of these circumstances is evidence of guilt, and you must not infer or assume from any or all of them that a defendant is more likely to be

guilty than not guilty.” (See CALJIC No. 1.00.) The jury was also instructed before and during argument that statements by counsel are not evidence. (CALJIC No. 1.02.)

Here, because of the court’s clear instructions and admonitions regarding both counsel’s comments, there does not appear to be “ ‘a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.)

Background - The Contents of Letters

In another part of closing argument, the prosecutor mentioned letters not introduced into evidence at trial that Sonia wrote defendant while he was in jail. “She writes him letters. That is not someone who is trumping [up of] a charge. If there was evidence in those letters she was trumping up a charge, I’m sure she [*sic*] would have brought the letters when she wrote them. There is no evidence like that. Those probably helped to show he is guilty.”

Defense counsel did not object to the prosecutor’s speculation about the contents of the letters, which were not in evidence.

Analysis

Defendant contends that it was incompetent of his trial counsel to fail to object to the prosecutor’s argument regarding the content of Sonia’s letters.

It is misconduct for the prosecutor to suggest in argument that other evidence of guilt exists that was not brought before the jury. (*People v. Ochoa, supra*, 19 Cal.4th at p. 466; *People v. Boyette* (2002) 29 Cal.4th 381, 452.)

Assuming that defense counsel should have objected to this argument, we are not persuaded that defendant was prejudiced. The jury had been instructed by the court not to speculate and that statements of counsel are not evidence. The prosecutor himself said in opening argument, “If it wasn’t said up here in the evidence envelope, it’s not evidence. You cannot just speculate and say that might have been and this is reasonable doubt.”

Under these circumstances, we conclude that there is no reasonable probability that defendant would have obtained a better verdict if defense counsel had objected to the prosecutor's improper suggestion about the contents of the letters. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1210-1211.)

IV. Ineffective Assistance of Counsel

Defendant contends that defense counsel was incompetent in his offer of proof of Sonia's history of making false accusations of abuse against men in her life, and that such failure resulted in the court not admitting evidence that Sonia had made a false accusation against her prior boyfriend.

Background

Before trial, defense counsel offered evidence that Sonia made a false accusation that her prior boyfriend had kidnapped her, and that such evidence was relevant under Evidence Code section 1101, subdivision (b), as showing a common scheme or plan to exaggerate or fabricate to get attention and to have someone incarcerated.

The court ruled: "I don't think there are sufficient similarities to show any kind of common plan, scheme, or design. It's basically that she falsely accused someone before, therefore, she must have done it this time. If she had falsely accused someone before for immigration reasons, if she falsely accused someone to get her life [*sic*], she falsely accused him to get his car or money or something of that sort, perhaps. But that's not the offer of proof I heard. I'll grant that and exclude the testimony of Officer Piscatella."

Analysis

Defendant asserts that defense counsel made the wrong offer of proof of Sonia's prior false accusation. Specifically, defendant contends that counsel should have offered to prove that Sonia's prior false accusation reflected a character trait that was relevant to her credibility under Evidence Code sections 780 and 1103, subdivision (a)(1), not that Sonia's prior false accusations demonstrated a common scheme or plan under Evidence

Code section 1101, subdivision (b).³ (*People v. Franklin* (1994) 25 Cal.App.4th 328, 335; *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 597-599.)

We believe that it is relevant to a witness's credibility that she has a character trait for making false accusations to the police against her boyfriends, whether or not the accusations are similar. Assuming for the sake of discussion that this evidence would have been admitted upon a proper offer of proof, we conclude that defendant was not prejudiced by its exclusion. Given the apparent dissimilarity of the incidents, we are not convinced that this evidence "would have seriously damaged Sonia's credibility." Though the jury heard no evidence of a prior false accusation, as discussed above (*ante*) there was other evidence impeaching Sonia's credibility Specifically, Sonia had a motive to accuse defendant of battery or extreme cruelty to obtain immigration advantages under the VAWA. Additionally, Crystal Vest testified that Sonia said she had exaggerated her injuries to the police. There were inconsistencies between Sonia's trial testimony and what she told the police, and there was evidence that Sonia had obtained a green card to work at McDonald's by providing false information.

In light of the other evidence about Sonia's credibility and defendant's guilt, "we are unpersuaded the jury would have formed a significantly different impression" of Sonia's credibility and that defendant would have obtained a more favorable verdict had the jury heard about a false accusation of Sonia's former boyfriend. (*People v. Fauber* (1992) 2 Cal.4th 792, 831; cf. *People v. Horton* (1995) 11 Cal.4th 1068, 1124.)

³ Evidence Code section 1103, subdivision (a)(1), allows evidence of a character trait of the victim if "(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character."

V. CUMULATIVE IMPACT

Defendant contends that even if no one error was prejudicial, they combined to have a cumulative prejudicial impact. In some cases, “a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 844-845, and cases there cited.)

In this case, we recognize that the court’s ruling limiting defendant’s cross-examination of Sonia about whether she had filed a VAWA application, and the bad offer of proof regarding a false accusation did combine to deprive the jury of a more accurate picture of Sonia’s credibility. However, as we have discussed, the jury was given other evidence relevant to her credibility. It appears the jury carefully considered the evidence, convicting defendant of a lesser charge than felony infliction of corporal injury on his spouse. Under these circumstances, we conclude that there was no cumulative prejudicial effect. The trial was not perfect, but it was fair. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Boyette* (2002) 29 Cal.4th 381, 468.)

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.